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DATE: **12/18/2017**

RE: **COMMONWEALTH V. JARRED W LOCKHART**
1773CR0003

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COMMENTS/DOCUMENTS: **MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S THIRD MOTION FOR POST-CONVICTION RELIEF**

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COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

PLYMOUTH, ss. **Docket No. 8583CR81865**

COMMONWEALTH

v.

DARRELL JONES

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S THIRD MOTION FOR POST-CONVICTION RELIEF

On November 11, 1985, Guillermo Rodrigues was shot in a restaurant parking lot in Brockton. He died from his wound three days later. On October 2, 1986, a jury convicted the defendant, Darrell Jones, of first degree murder for killing Rodrigues. The Supreme Judicial Court affirmed the conviction on April 4, 1990. *Commonwealth v. Jones*, 407 Mass. 168 (1990). Since then, the defendant has moved for a new trial three times.

In his third motion, the defendant asserts the following claims: (1) police tampered with an audio-visual recording of an interview of an eyewitness and covered it up through false testimony; (2) the Commonwealth withheld exculpatory evidence; (3) his trial attorney provided ineffective assistance due to the attorney's conflicts of interest; (4) his trial attorney was ineffective in preparing and presenting a defense; and (5) the identification procedures used by the police were improperly suggestive. After the motion was filed, the defendant brought to the court's attention a news report in which one of the trial jurors was quoted. According to the report, the juror asserted that during jury deliberations another juror expressed bias against the defendant because the defendant is black. The court allowed the defendant to amend his motion to add a claim that jury deliberations were infected by racial bias.

The court has received and reviewed the trial transcript and other pertinent exhibits and documents. In addition, the court held an evidentiary hearing on the issue of whether the Brockton police tampered with evidence. The court also summonsed and questioned all available jurors concerning the allegation of racial bias.

THE TRIAL

The trial began on September 22, 1986. Jury selection was completed on the first day. During the empanelment, the trial judge (Byron, J.) asked the jurors the questions required by rule 20 (b) (1) of the Massachusetts Rules of Criminal Procedure, including the question: "Do you have any bias or prejudice about this case which is about to be tried?" Trial Tr., 9/22/86, p. 16. The specific issue of racial prejudice did not arise during empanelment.

The Commonwealth presented evidence at trial that on the evening of November 11, 1985, the defendant, also known as "Diamond," and the victim, Guillermo Rodrigues, also known as "Pow," were both in Pete & Mary's bar on Montello Street in Brockton. At about 10:30 p.m., Rodrigues and a black man crossed Montello Street, walking from the side where Pete & Mary's was located to the opposite side where a D'Angelo's restaurant was located. The two men entered the restaurant parking lot. The black man was holding onto Rodrigues and pushing him forward. When they reached the middle of the lot, the black man put a gun against Rodrigues and fired. Rodrigues fell to the ground. The shooter fled on a side street.

Robert Kanicholas testified that he is the owner of a bar, called the Colonial Spa, located on Franklin Street about 300 yards from Pete & Mary's bar. At about 10:30 p.m. on November 11th, he noticed a black man in the bar, which was unusual. The next morning, while cleaning the bar, Kanicholas found a handgun in the trash in the men's room. Trial Tr., 9/25/86, pp. 44-47. Ballistics testing showed it was the gun used to shoot Rodrigues. Trial Tr., 9/25/86, p. 97.

Two motor vehicles in the D'Angelo's parking lot were occupied by witnesses who saw the shooting. Paul Jones and his fiancée, Denise Perkins,[1] were sitting in a vehicle in the lot, eating sandwiches they had purchased at the restaurant. They chased the shooter in their motor vehicle as he ran up a side street but lost him and returned to D'Angelo's. Both Jones and Perkins testified at trial.

The other vehicle parked in the D'Angelo's lot was occupied by five people who were leaving Pete & Mary's bar. Those five individuals were Walter "Bo Bo" Watson, Edna Levine, Terri Lynn Starks, Lisa Pina and Alfred Morreau. After the shooting, they summoned an ambulance and then left the scene. All of these individuals, except Morreau, also testified at trial.

None of the eyewitnesses who testified at trial made an in-court identification of the defendant as the shooter. No forensic evidence linked the defendant to the shooting. No evidence was presented that the defendant had a motive to kill Rodrigues or that he even knew Rodrigues. Nevertheless, evidence was presented from which the jury could conclude that the defendant was the shooter.

On November 12th and 14th, Detective Donald LaGarde of the Brockton Police Department twice showed the same photo array to Denise Perkins. Perkins testified that she did not identify the shooter the first time she viewed the array but the second time she "narrowed it down" to the defendant's photograph because he "looked almost exactly like the guy I saw...." Trial Tr., 9/24/86, p. 24. Det. LaGarde testified that Perkins identified the defendant as the shooter both times she viewed the array, although the first time she said she was not one hundred percent sure. Trial Tr., 9/25/86, pp. 56-58.

[1] After the shooting and before the trial, Mr. Jones and Ms. Perkins were married and Ms. Perkins took the surname, Jones. To avoid confusion, the court will refer to her by her name at the time of the incident.

Perkins also testified that prior to the shooting she saw a black woman enter D'Angelo's, walk across the street to Pete & Mary's and then return to D'Angelo's accompanied by a black man. The woman then left in a motor vehicle and the man went back to Pete & Mary's. Perkins testified that the man who accompanied the woman was the shooter. Trial Tr., 9/24/86, pp. 7-12.

Paul Jones testified to the same observations. Although he was not "one hundred percent sure," he thought the man at D'Angelo's was the shooter. Trial Tr., 9/24/86, pp. 44-48 & 60-61. Jones testified that police twice showed him photographs. The first time, he did not make an identification. Trial Tr., 9/24/86, pp. 57-58. The second time, he identified a photograph as depicting the man he saw at D'Angelo's. Trial Tr., 9/24/86, pp. 58-61.

Bridgette Struthers testified that she was in Pete & Mary's bar that night and that she went to D'Angelo's and ordered a sandwich. She then returned to Pete & Mary's and went back to D'Angelo's accompanied by the defendant. She then left the area in a motor vehicle and the defendant returned to Pete & Mary's. Trial Tr., 9/24/86, pp. 124-128.

Terri Lynn Starks testified that after leaving Pete & Mary's with her friends, they got into Bo Bo Watson's car, which was parked in the D'Angelo's lot. She saw a tall Cuban man and a shorter man cross Montello Street. She had seen both of them in Pete & Mary's. The shorter man was grabbing the taller man's jacket and had a gun in his right hand. They entered the parking lot. About half way through the lot, the shorter man raised the gun and the taller man fell to the ground. The shorter man ran away. Trial Tr., 9/23/86, pp. 41-46.

Starks testified that within a few weeks of the shooting she gave a video-recorded interview to Det. Joseph Smith at the Brockton police station. During the interview, she viewed photographs and identified a photograph of the shooter. Trial Tr., 9/23/86, pp. 47-48. During

Det. Smith's testimony, he produced the photograph that Starks picked from the array. The photograph was displayed for the jury. Trial Tr., 9/29/86, pp. 26-30.

Det. Smith testified that he videotaped the interview of Starks. He said that he had used video recording equipment "a dozen, 15, 20" times previously as a police officer. Trial Tr., 9/29/86, p. 30. After the interview he marked the videotape. He also reviewed the tape and testified that it was a fair and accurate recording of the interview. Trial Tr., 9/29/86, p. 32. At trial, Det. Smith identified the videotape. When the tape was played for the jury, however, it was in an altered condition. Part way through, the Starks' interview was interrupted by an episode from the 1950s' television program *The Phil Silvers Show*, also known by the name of its main character, "Sergeant Bilko." After about fourteen seconds, the tape recording returned to the Starks interview. Det. Smith explained how the interruption occurred. He testified that when he played the tape for the defendant's attorney he "inadvertently pressed [the] record button rather than the play button" and the television show "was recorded over a portion of the Terri Starks interview." Trial Tr., 9/29/86, p. 36.

Just before the interruption on the videotape, Starks states that the shorter of two men she saw crossing the street had a gun. Immediately after the interruption, she describes being in the car and seeing the shooting. Thus, the part of the interview that is missing appears to be her description of what she observed as the two men approached.

Conflicting evidence was presented as to whether Lisa Pina and Edna Levine identified the shooter when police showed them photo arrays. Pina testified that Det. Smith showed her a photo array and insisted she pick a photo. She reluctantly picked a photograph that "happened to be" the defendant's photograph but would not say that he was the shooter. Trial Tr., 9/24/86, p. 83. Levine testified that she identified a photograph as the defendant but did not say he was

the shooter. Trial Tr., 9/24/86, p. 114. Det. Smith testified to the contrary that both Pina and Levine said the defendant's photograph depicted the shooter. [2] Trial Tr., 9/29/86, pp. 11 & 20.

Evidence was also presented that at the time of the shooting either Edna Levine or Terri Lynn Starks identified the defendant as the shooter. The witnesses, who were all seated in Bo Bo Watson's car at the time the statement was made, contradicted each other on the details.

Terri Lynn Starks testified that when she saw the two men crossing the street she said, "That man is holding a gun on that other guy." Edna Levine replied, "That's Diamond. He used to stay at my house." Trial Tr., 9/23/86, p. 45.

Edna Levine testified that she did not see the two men crossing the street and did not make the statement attributed to her by Starks. Trial Tr., 9/24/86, pp. 109-110 & 117-118. She testified that that it was Starks who made the identification. According to Levine, Starks said, "Edna, Diamond has a gun." Trial Tr., 9/24/86, p. 109. Starks denied saying the man with the gun was Diamond. Trial Tr., 9/23/86, p. 50.

Lisa Pina testified that after the shooting, as they were leaving, either Edna Levine or Terri Lynn Starks said, "That damn Diamond." Pina asked who Diamond was "and they said never mind, Lisa, leave it alone, never mind." Trial Tr., 9/24/86, pp. 79 & 81.

Walter "Bo Bo" Watson testified that someone in the car, who he did not name, said that two guys were coming across the street and it "looked like they were arguing." "They said there come two guys coming across the street; I asked them who it was. ... They started saying it was Darrell Jones. ... I said who in the hell is Darrell Jones. They says he done shot somebody. I says I don't know who it is. I said who." Trial Tr., 9/24/86, pp. 95-96. Watson

[2] Det. Smith's testimony was admitted for impeachment purposes under *Commonwealth v. Daye*, 393 Mass. 55, 61-62 (1984), which was overruled after the trial by *Commonwealth v. Cong Duc Le*, 444 Mass. 431, 432, 435–442 (2005).

testified that the person who identified the shooter used the name "Darrell Jones" and did not use the name "Diamond." Trial Tr., 9/24/86, p. 102.

The Commonwealth also introduced evidence from which the jury could conclude that the defendant lied to the police. Det. LaGarde testified that he interviewed the defendant on November 17, 1985. According to Det. LaGarde, the defendant said that he never left Pete & Mary's bar before the shooting. When asked if he got a sandwich from D'Angelo's, the defendant said that "a friend, whose name he didn't know, had gone across the street to purchase a sub for him and that he had stood in the doorway and awaited her return." Trial Tr., 9/25/86, pp. 64 & 67-68.

Evidence was also presented that tended to show that the defendant was not the shooter. Officer Richard Shanks of the Brockton police testified that after the shooting, the defendant, who he knew, exited Pete & Mary's and was among a group of people standing outside the bar. The defendant asked Officer Shanks what had happened. Officer Shanks told him that someone had been shot. Officer Shanks asked Denise Perkins and Paul Jones to look at the people standing outside Pete & Mary's to see if any of them were involved in the shooting. Both Perkins and Jones looked at the group of people. Neither one identified the defendant as being involved. Trial Tr., 9/23/86, pp. 119-120 (Off. Shanks). Trial Tr., 9/24/86, pp. 19-20 (D. Perkins) & pp. 55-56 (P. Jones).

The defendant called three witnesses, Andrew Augustine, Vinelle Dukes and Evelyn Anderson, all of whom testified that at the time of the shooting the defendant was sitting in a booth inside Pete & Mary's eating a sub. Trial Tr., 9/29/86, pp. 68-71 (A. Augustine); pp. 87-89 (V. Dukes); and pp. 104-107 (E. Anderson).

On the third day of trial, defense counsel revealed to the judge and to his client that four or five years earlier he represented three of the police officers who were witnesses at the trial. He said that he had represented Sgt. Fotis Colocousis in a civil suit arising out of Colocousis' actions as a police officer. He had also represented Det. Joseph Smith, the lead detective in the case, in a will contest. He said that he had also previously represented Det. Donald LaGarde in a civil matter "and in fact I think at the present I have an open file of his that one of my associates has, I've had nothing to do with it in the last three years or so, a civil dispute in the family, that he's a defendant on." Trial Tr., 9/24/86, pp. 85-86. He also said that he presently represented Paul Jones' mother in a civil matter. Trial Tr., 9/24/86, pp. 87-88.

The trial judge conducted a colloquy with the defendant. The judge explained that "there is always a potential that a lawyer will not cross-examine a client or a former client as vigorously as he would another person." The judge asked the defendant if he had any objection to defense counsel continuing to represent him or if he wanted time to think about it. The defendant replied, "No, I don't need no time; yes, I will keep my same lawyer. I'm not changing; I'm not even considering that." The trial judge made a finding that the defendant had voluntarily and knowingly decided to be represented by his attorney and ruled that the attorney could continue to represent the defendant. Trial Tr., 9/24/86, pp. 87-90.

Jury deliberations began at 12:01 p.m. on September 30, 1986. At 4:40 p.m., the jury requested instruction on the definition of reasonable doubt. At 4:25 p.m. on October 1st, the jury reported that they were deadlocked. The court gave the *Tuey-Rodriquez* instruction for deadlocked juries. The jury resumed deliberations on October 2nd and returned a verdict of first degree murder later that afternoon.

POST-CONVICTION PROCEEDINGS

On direct appeal to the Supreme Judicial Court, the defendant argued: (1) that there was insufficient evidence identifying him as the shooter; and (2) Det. LaGarde's testimony, admitted for impeachment, that Pina and Levine identified the defendant as the shooter in pretrial photographic arrays should not have been admitted. The Supreme Judicial Court rejected those arguments and also denied relief under G.L. c. 278, § 33E. The Court affirmed the conviction on April 4, 1990. *Commonwealth v. Jones,* 407 Mass. 168 (1990).

On June 8, 1992, the defendant moved for a new trial on grounds that his appellate attorney provided him with ineffective assistance of counsel by failing to argue that the defendant's waiver of his right to testify was invalid. (Paper #49.) The defendant contended that he waived his right to testify at trial because his trial attorney improperly advised him that if he testified, the prosecution could introduce evidence that he had failed a polygraph test.[3] The trial judge denied the motion for new trial on June 8, 1992. A single justice of the Supreme Judicial Court denied the defendant's petition to appeal the trial court's ruling. *Commonwealth v. Jones,* Docket No. SJC-1993-67.

On April 25, 2000, the defendant filed a second motion for new trial. (Paper #61.) The defendant claimed ineffective assistance by both trial and post-conviction counsel for failing to raise claims that: (1) the defendant's trial attorney improperly compelled him to sit in the prisoner's dock during the trial; (2) the court failed to conduct a colloquy with the defendant concerning his right to testify prior to the polygraph examination; and (3) the defendant's trial attorney had a conflict of interest because he also represented some of the Brockton Police officers who testified against the defendant. On August 1, 2000, the court (Tierney, J.) denied

[3] Polygraph test results were admissible for purposes of impeachment at the time of the defendant's trial. While the defendant's direct appeal was pending, the Supreme Judicial Court held that such evidence may not be admitted for any purpose, including impeachment. See *Commonwealth v. Mendes,* 406 Mass. 201, 212 (1989).

the motion. A single justice of the Supreme Judicial Court denied the defendant's petition to appeal from the trial court's ruling. *Commonwealth v. Jones,* Docket No. SJC-2000-352.

On October 23, 2015, the defendant filed his third motion for post-conviction relief. (Paper #75.) The court held a series of evidentiary and non-evidentiary hearings on the motion.

THE DEFENDANT'S CLAIMS

Rule 30 (b) of the Massachusetts Rules of Criminal Procedure provides that, on motion of the defendant, the trial court "may grant a new trial at any time if it appears that justice may not have been done."[4] The defendant contends that justice was not done for six reasons.

1. Racial Bias of a Juror

The defendant contends that he was denied his constitutional right to trial by an impartial jury because one of the trial jurors was racially biased. The issue arose as the result of a 2016 news report jointly published by WBUR radio and the New England Center for Investigative Journalism. The report quoted Eleanor Urbati, one of the jurors at the defendant's 1986 trial. According to the report, Urbati claimed that during jury deliberations two other jurors said that they thought the defendant was guilty because he is black. The defendant brought the article to the court's attention in June of 2017. The court allowed the defendant to amend his third motion for post-conviction relief to assert the claim of racial bias.

A. Facts Relating to Racial Bias Claim

With the agreement of both parties, the court conducted a hearing on the issue of racial bias. Four jurors were available to be interviewed: Maureen Bates, Charles Costas, Vivian Lajoie and Eleanor Urbati. The court questioned all four, under oath, about remarks made by jurors directly or indirectly concerning race. The court credits the testimony of all four jurors.

[4] The defendant also relies on Mass. R. Crim. P. 25 (b) (2) but makes no distinct argument under that rule.

Maureen Bates had only a vague memory of the trial due to the fact that the trial was over thirty years earlier. She testified that she did not recall any juror making any comment that directly or indirectly concerned race. However, she could not exclude that possibility because "it's just too long." Motion Hearing Tr., 8/1/17, p. 18.

Charles Costas was the foreperson of the jury. He testified that he remembered the deliberations. He did not recall any juror making any direct or indirect reference to race. He said that if any juror had made such a statement he thought he would remember it. However, he added that "there were always conversations going on ... and I wasn't privy to everything." Motion Hearing Tr., 8/1/17, p. 22. He also testified that to the best of his memory all of the jurors were white. Motion Hearing Tr., 8/1/17, p. 25.

Vivian Lajoie was the alternate juror at trial and therefore was not present during jury deliberations. She testified that she had a vague memory of the trial and recalled being with the other jurors during the trial, apart from deliberations. She testified that she did not recall any conversations among the jurors. She added, "I mean, I think, you know, race might have stood out considering the circumstances, but nothing comes to mind. So I can't say whether there was or there wasn't [a statement concerning race]." Motion Hearing Tr., 8/1/17, pp. 28-29.

Eleanor Urbati testified that at the start of deliberations, before any discussion had taken place, a male juror urged other jurors to take an immediate vote. He said that he thought the defendant was guilty. The following exchange then occurred between Ms. Urbati and the male juror: "And I said, 'Well, what makes you say that, that he's guilty?' And he just repeated that he was guilty. And I said, 'Are you saying that because he's black?' And he said, 'Yes.'" Motion Hearing Tr., 9/1/86, p. 18. Ms. Urbati was too shocked to reply. None of the other jurors said anything in reply to the male juror. The male juror made this statement in a serious

manner. He was not joking or being sarcastic. Ms. Urbati was unable to identify the male juror. No other remarks were made concerning race. Motion Hearing Tr., 9/1/86, p. 19-20.

Later during the deliberations, the same juror who made the remark about the defendant being guilty because he is black made the statement: "I'll say anything just to get out of here." Motion Hearing Tr., 9/1/86, p. 36.

B. Analysis of Racial Bias Claim

"Article 12 of the Declaration of Rights of the Massachusetts Constitution and the Sixth Amendment to the United States Constitution, applied to the States through the due process clause of the Fourteenth Amendment, guarantee the right of a criminal defendant to a trial by an impartial jury. 'The presence of even one juror who is not impartial violates a defendant's right to trial by an impartial jury.'" *Commonwealth v. McCowen,* 458 Mass. 461, 494 (2010), quoting *Commonwealth v. Vann Long,* 419 Mass. 798, 802 (1995).

As a general rule, a jury's verdict may not be challenged by evidence of what occurred during deliberations. Mass. G. Evid. § 606 (b) (2017 ed.) In 2010, however, the Supreme Judicial Court decided that a challenge based on evidence that a juror was racially biased constitutes an exception to the general rule. *McCowen, supra.* In 2017, the United States Supreme Court adopted the same rule. "[W]here a juror makes a clear statement that indicates [a juror] relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Peña-Rodriguez v. Colorado,* ___ U.S. ___, 137 S.Ct: 855, 869 (2017).

In *Peña-Rodriguez,* the Supreme Court did not reach the issue of what procedures a lower court must follow to resolve such a claim; nor did it decide "the appropriate standard for

determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted." *Id.*, 137 S.Ct. at 870. In *McCowen,* however, the Supreme Judicial Court did decide those issues.

The Supreme Judicial Court held that "[w]here a defendant files an affidavit from a juror ... alleging that a juror (or more than one juror) made a statement to another juror that reasonably demonstrates racial or ethnic bias, and the credibility of the affidavit is in issue, the trial judge should conduct a hearing to determine the truth or falsity of the affidavit's allegations, because 'the possibility raised by the affidavit that the defendant did not receive a trial by an impartial jury, which was his fundamental right, cannot be ignored.'" *McCowen* at 494, quoting *Commonwealth v. Laguer,* 410 Mass. 89, 97 (1991).

In this case, the defendant sought permission from the court to contact the jurors for the purpose of obtaining such an affidavit. However, no affidavit was filed because both parties and the court agreed that the news report itself was sufficient reason to hold a hearing.[5]

In *McCowen,* the Supreme Judicial Court established a two-part test to resolve such claims. "In evaluating claims of juror bias, a judge ... must first determine whether the defendant has satisfied his burden of proving by a preponderance of the evidence that the challenged statements that possibly reflect racial or ethnic bias were actually made by the juror. ... If the judge finds that the statements were not made, the judge need make no further findings." *McCowen, supra* at 494-495.

"Where one or more of the challenged statements are shown to have been made, the judge must then determine whether the defendant has proved by a preponderance of the evidence that the juror who made the statements was actually biased because of the race or

[5] To the Commonwealth's credit, it urged the court to reach this important issue of racial bias, even when the defendant himself – in an emotional outburst – asked the court to end the inquiry. Motion Hearing Tr., 7/13/17, pp. 87-90 (Defendant's request to terminate hearing). *Commonwealth's Request Regarding Jurors* (Aug. 2, 2017).

ethnicity of a defendant, victim, defense attorney, or witness. ... A juror is actually biased where her racial or ethnic prejudice, had it been revealed or detected at voir dire, would have required as a matter of law that the juror be excused from the panel for cause. ... In some instances, the statement made by the juror may establish so strong an inference of a juror's actual bias that proof of the statement alone may suffice. ... Generally, though, the judge must determine the precise content and context of the statement to determine whether it reflects the juror's actual racial or ethnic bias, or whether it was said in jest or otherwise bore a meaning that would fail to establish racial bias." *McCowen* at 495-496.

The court finds that the male juror responded, "Yes," when asked whether he thought the defendant was guilty because he is black. Despite the fact that other jurors did not hear or do not remember the statement over thirty years later, Ms. Urbati was very precise and consistent in her description. It was clear to this court that the event has weighed heavily on Ms. Urbati over many years. As courts routinely instruct jurors, it is the quality of the evidence – not the quantity – that matters. Ms. Urbati's testimony about the male juror's statement was credible and persuasive. The court must therefore turn to the second part of the test.

The court finds that the juror who made the statement was, in fact, racially biased. Ms. Urbati testified credibly that the male juror made the statement in seriousness. He was not joking. He was not being sarcastic. He did not say it in a manner that indicated the statement should be construed in any way except at face value. If such a statement had been made during jury selection, there is no question that the court would be required to exclude the juror from hearing the case. *Commonwealth v. Colton*, 477 Mass. 1, 17 (2017) ("As a general principle, it is an abuse of discretion to empanel a juror who will not state unequivocally that he or she will be impartial.")

The Commonwealth points out that the testimony in the case, from all the witnesses who saw the shooting, was that the shooter was a black man. The Commonwealth argues that the juror, in saying that he thought the defendant was guilty because he is black, was simply commenting on the evidence. That is possible. However, the court does not find it to be true. Race was an important issue in the community. The fact that a black man entered the Colonial Spa – just up the street from Pete & Mary's – was sufficiently unusual to be noteworthy to the owner. One of the jurors stated that a racial comment "might have stood out considering the circumstances." Motion Hearing Tr., 8/1/17, pp. 28-29. The circumstances were that a black man killed a light-skinned Hispanic man.[6] Our Commonwealth has had a long, sad history of racial bias that persists today.[7] In the context of a 1986 trial of a black man for murder, the meaning of Eleanor Urbati's question – "Are you saying that [he's guilty] because he's black?" – was plain. She was not asking about the evidence. She was asking about racial bias. The juror's response – a simple, "Yes," without qualification or reference to the evidence – was equally plain. If the juror intended to comment on the evidence, he would have mentioned the evidence.

The constitutional right to be tried by an impartial jury is the foundation of fairness in the criminal justice system. "Because actual juror bias affects the essential fairness of the trial, a defendant who has established a juror's actual bias is entitled to a new trial without needing to show that the juror's bias affected the jury's verdict." *McCowen* at 496.

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[6] Several witnesses, including Terri Lynn Starks, described the victim as "Cuban." Trial Tr., 9/23/86, pp. 42. Paul Jones described him as "Spanish or "Cuban." Trial Tr., 9/24/86, p. 50. Lisa Pina described him as having "[l]ight skin." Trial Tr., 9/24/86, p. 78. Pina described the shooter as a "dark-skinned man." Trial Tr., 9/24/86, p. 77.

[7] See, e.g., *Boston Sunday Globe*, Spotlight Series, "Boston. Racism. Image. Reality." (Dec. 10, 2017).

The evidence establishes that one of the trial jurors was racially biased. The defendant did not receive a trial before an impartial jury. Since the defendant did not receive a fair trial, his conviction cannot stand.

2. Police Misconduct

The defendant also contends he is entitled to a new trial because newly discovered evidence indicates police tampered with the audio-visual tape recording of an interview of Terri Lynn Starks and testified falsely at trial concerning the alteration of the recording.

A. Facts Relating to Police Misconduct Claim

The court held an evidentiary hearing on the claim that police deleted exculpatory evidence from the audio-visual recording of the interview of Terri Lynn Starks. The court heard testimony from three witnesses: Marisa T. Déry, who is an expert in the forensic examination of audio recordings; Jeffrey Spivack, who is an expert in the forensic examination of video recordings; and Detective Joseph Smith, who is now retired but at the time of the trial was the lead investigator on the case for the Brockton police.

The court credits the testimony of the defendant's experts. Their forensic analysis of the audiovisual recording is based on methods that were not reasonably available to the defendant at the time of trial or at the time of his first two motions for new trial.

Based on the experts' testimony, the court finds that the videotape recording of the Starks interview that was admitted in evidence at trial, Trial Exhibit 21, is not the original recording of the interview. It is a copy that was made using a procedure that Mr. Spivack referred to as a "crash edit." Two video cassette recorders were used to copy a recording of the Starks interview from one VHS tape to another VHS tape. The second tape, which became Trial Exhibit 21, contained a pre-existing recording of the Sgt. Bilko show. The Starks

interview was copied over that pre-existing recording. At the point where the Sgt. Bilko segment begins on Trial Exhibit 21, the operator stopped the recording VCR, while allowing the VCR playing the original tape to advance. The operator then pressed the record button on the recording VCR. This procedure created an interruption of about fourteen seconds on Trial Exhibit 21. A portion of the Sgt. Bilko show remained in that gap. This procedure also omitted anywhere from eighteen seconds to two minutes and sixteen seconds of the original recording of the interview from the copy introduced in evidence as Trial Exhibit 21.

At the hearing on the defendant's motion for new trial, Det. Smith testified that he did not have the technical ability to delete material through such a procedure.

DIRECT EXAMINATION BY MS. KENNEY:

Q. Okay. And so in this case, when – after the interview was recorded, were you able to make a copy of it for the prosecutor or for the defense attorney?

A. Did I make a copy?

Q. Were you able to?

A. I don't know how to make a copy.

Motion Hearing Tr., 7/13/17, p. 31.

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Q. You've reviewed some of the pleadings in this case, and you're aware that at this point the defendant is asking this Court to make a finding that you tampered with the evidence or that you intentionally extracted something from that tape, correct?

A. Yes. That's right.

Q. Is that accurate, detective?

A. They give me credit for more than I know. I couldn't do that. If you offered me a million dollars, I couldn't do it. So –

> Q. So did you intentionally remove any information from that interview?
>
> A. Of course not.
>
> Motion Hearing Tr. 7/13/17, p. 35.

However, the trial transcript indicates that Det. Smith did know how to edit a videotape. At one point, the prosecutor addressed the trial judge on how to edit the tape to avoid playing inadmissible material in front of the jury:

> MR. CUNNINGHAM:
>
> > Your Honor, Detective Smith proposed something, that if we were to have two machines and sit down and have this tape [played] and record tape, the other machine record, we could do it so [a]s that we would take the parts that would be admissible from this tape and put them on the other tape.
> >
> > Trial Tr., 9/25/86, p. 42.

Although the court finds that Det. Smith knew how to edit the videotape, the court does not find that Det. Smith is the person who performed the crash edit. Nevertheless, since the videotape was in the exclusive possession of the Brockton police, the court does find that the crash edit was performed by an officer or employee of the police department.

The court does not find that the person who performed the crash edit did so for the purpose of deleting exculpatory evidence. Because Starks testified at trial, anything she said on the videotape could be elicited from her in front of the jury. Merely deleting a statement Starks made on the recording would not keep it from the jury unless, at the time of trial, Starks were colluding with the police to hide exculpatory evidence. There is no indication Starks was colluding with the police to convict the defendant. When the prosecutor asked her to identify the shooter in the court room, she failed to identify the defendant:

Q. Terri Lynn, if you could look around this courtroom very carefully and see if you see the man who shot Guillermo Rodrigues on November 11, 1985, in this courtroom today?

A. I can't be positive.

THE COURT: What was that answer?

A. I can't be positive because I don't remember exactly how he looks any more.

Trial Tr. 9/23/86, p. 48.

This testimony is inconsistent with collusion between Starks and the police. The fact of the crash edit does not establish the reason for the crash edit. The crash edit may have occurred when an inexperienced or technically inept VCR operator made a copy of the VHS tape.

While the court concludes that the evidence does not demonstrate that the crash edit was for an improper purpose, the court also concludes, based on Det. Smith's own testimony, that Det. Smith's explanation to the trial judge and jury as to how the tape was altered was false.

At a voir dire hearing at trial, held outside the presence of the jury, Det. Smith gave a very detailed explanation as to how the videotape was altered:

DIRECT EXAMINATION BY MR. CUNNINGHAM:

Q. I show you this, Detective, and ask if you can identify that.

A. Yes, it's my printing.

Q. And what do you recognize that to be?

A. A videotape of the Terri Starks interview of 11/26/85.

***

Q. Detective, after marking that videotape, did you have an occasion to replay it to yourself?

A. Yes.

Q. And did you replay the entire tape?

A. Yes.

Q. And did that fairly and accurately depict the events that occurred during your interview with Terri Lynn Starks?

A. Yes.

Q. Now at some point in time in January of 1986, did you have an occasion to play that tape for Attorney Elias?

A. Yes.

Q. And did some malfunction occur?

A. Yes.

Q. Regarding that tape?

A. Yes.

Q. Would you tell us what happened?

***

A. Yeah, I inadvertently, somewhere along about the middle of the interview, pressed the record button on the V.C.R. as opposed to the play button and recorded about 20 seconds of a T.V. program.

Q. And is it fair to say that that portion of the tape was not recorded at the time that you recorded the interview with Terri Lynn Starks?

A. No, that's correct, sometime after that.

Q. And that was not on the tape when you first viewed it?

A. No.

MR. ELIAS: I don't understand this.

***

CROSS-EXAMINATION BY MR. ELIAS:

Q. The malfunction, was I aware that it was malfunctioning or did you find that out later that something ---

A. No, we talked about it.

***

Q. You mean you recorded something else over that tape while I was there?

A. Right.

Q. And I knew that?

A. Yeah. We discussed it.

Q. You mean maybe you told me that something went wrong and you got a T.V. program or something.

A. Yeah; in fact, the program is about 20 or 30 seconds of Sergeant Bilko.

***

Q. How do you know that you showed me a tape and I was watching it, you didn't tell me that stuff wasn't on there, did you?

A. Mr. Elias, I said I made a mistake and pressed the record instead of the play button and we laughed about it.

***

MR. ELIAS: It's probably immaterial; I don't even remember it.

Trial Tr., 9/25/86, pp. 15-18.

Det. Smith repeated this explanation in his testimony before the jury.

DIRECT EXAMINATION BY MR. CUNNINGHAM:

Q. Detective, directing your attention to the videotape marked as exhibit 21, did you have an occasion to show a videotape to Attorney Elias at some point in January 1986?

***

Q. Did you have occasion to view that videotape with Attorney Elias?

A. Yes.

Q. Where did you view that videotape?

A. Brockton Police Academy.

Q. At some point in time, through either a malfunction of the equipment or inadvertence on the operator's part, did something happen to that tape?

A. Yes.

Q. What happened?

A. I inadvertently pressed record button rather than the play button at one point along about the middle of the interview, I would say, and there is about 15 seconds, 20 seconds, of a network show that was recorded over a portion of the Terri Starks interview, it's when Sergeant Bilko comes charging in.

Trial Tr., 9/29/86, pp. 35-36.

This testimony was incorrect in two respects. First, the tape introduced in evidence was not the original tape recording. It was a copy from which material had been omitted in a crash edit. The original tape was not altered by the crash edit. So far as the evidence shows, the original tape remained in the possession of the Brockton Police Department.

Second, Det. Smith's trial testimony explaining how he accidentally deleted material from the "original" tape was false. At the hearing on the defendant's motion for new trial, Det. Smith repudiated this explanation. Det. Smith testified that he never touched the VCR while playing the tape for the defendant's attorney and has no idea how the recording of the Starks interview came to be interrupted by the Sgt. Bilko show:

DIRECT EXAMINATION BY MS. KENNEY:

Q. Okay. Do you recall when the defendant – this defendant's attorney Mr. Elias came to the Brockton PD to view the tape? Do you have a specific memory of that as you sit here today?

A. He asked if he could see the tape, yes.

Q. Okay and do you have a memory of doing that, of showing him that tape?

A. Yes.

Q. And when that happened, what happened with the tape?

A. It – I would say for maybe 15 minutes we were into the interview, and all of a sudden, it switches over for maybe ten or twelve seconds to a TV show, Sergeant Bilko TV show, and then it goes back to the interview.

Q. And were you pressing any buttons or touching the VCR or the camcorder while that happened while you were playing it back?

A. No. I never knew that it had happened.

Q. And do you recall having a conversation with Mr. Elias about observing that error and seeing Sergeant Bilko?

A. Yes.

Q. What was the nature of that conversation?

A. "What was that?" And I said, "I have no idea." He said, "How'd it happen?" I said, "I don't know." And he made a remark, said something about Sergeant Bilko being a witness or something. We had a laugh over it, and that was it.

Q. As you sit here today, do you have any memory or any knowledge or any idea how that irregularity occurred on the tape?

A. It's a complete anomaly to me. I watched the tape. It's as I described. I never left my seat to shut it off. And it came back on its own. The interview I'm talking about. I never left my seat, and it came back on its own. Nobody got up. Nobody moved, nobody came in, nobody touched it. So how it got on there, your guess is as good as mine. I have no idea.

***

Q. Do you recall that you did testify to explain to the judge how the Sergeant Bilko came to exist on the tape that was outside the presence of the jury?

A. Yes, I do, yeah.

Q. Okay. And do you recall that you made a statement that you inadvertently pressed the record button rather than the play button?

A. I said that's the only thing that I – the only way that that could've happened.

Motion Hearing Tr., 7/13/17, pp. 33-35.

Det. Smith elaborated on his prior explanation during cross-examination:

CROSS-EXAMINATION BY MR. AUSTIN:

Q. Okay. And in fact, you gave it twice, because you gave it not only during voir dire, which I just read, but you also testified that way to the jury; isn't that true?

A. That's the only way at that time that I figured it happened. But upon viewing it, I never left my – nobody ever went near the machine. I never got up. There was no need for me to get up. When asked at trial, that was the – I thought maybe I got up and pressed it inadvertently, because the interview as far as I was concerned was drawing to a close.

Q. Well when you were asked –

A. But apparently that's not what happened, so –

Motion Hearing Tr., 7/13/17, pp. 41-42.

At trial, Det. Smith testified that the Sgt. Bilko segment was recorded over the Starks interview when he accidentally pressed the wrong button on the VCR. At the hearing on the new trial motion, Det. Smith testified that his prior explanation was not true. Det. Smith must

have known at the time of trial that he did not accidentally press the record button, just as he testified thirty years later at the motion hearing.

The court finds that someone affiliated with the Brockton Police Department made a copy of the original videotape of the Starks interview. During the copying process – intentionally or accidentally – a portion of the interview was omitted from the copy. At trial, Det. Smith thought that the copy was the original tape. He saw that it contained a segment of the Sgt. Bilko show instead of Starks' description of the shooting. He concluded that the original tape had been altered by the Brockton police. He knew that would appear highly suspicious to the court and jury. Det. Smith provided the judge and jury with an innocent, but false, explanation of the missing segment of the Starks interview in order to dispel the appearance that the police had intentionally tampered with a key piece of evidence. [8]

B. Analysis of the Police Misconduct Claim

"To prevail on a motion for a new trial on the basis of newly discovered evidence, a defendant must meet both prongs of a two-part test. First, a defendant 'must establish that the evidence was unknown to the defendant or trial counsel and not reasonably discoverable at the time of trial.' ... Second, a defendant must show that the evidence 'casts real doubt on the justice of the conviction.'" *Commonwealth v. Cowels*, 470 Mass. 607, 616 (2015), citing *Commonwealth v. Shuman*, 445 Mass. 268, 271 (2005) and *Commonwealth v. Grace*, 397 Mass. 303, 305 (1986). "Newly discovered evidence ... 'casts real doubt on the justice of the conviction,' [if] the evidence 'would probably have been a real factor in the jury's deliberations.'" *Commonwealth v. Brescia*, 471 Mass. 381, 389 (2015) (footnote omitted).

[8] There is no suggestion, and the evidence does not support the conclusion, that the prosecutor had any knowledge – or any reason to suspect – that Det. Smith's trial testimony was false.

The defendant easily meets the first part of the test. He was not aware that Det. Smith's explanation of the accidental manner in which the videotape had been altered was wrong or that the police had performed a "crash edit" on the tape. He only became aware of those facts as a result of scientific forensic testing that was not available at the time of his trial or at the time of his prior motions for new trial.

The second part of the test requires the defendant to show that the newly discovered evidence would have affected the jury's deliberations. "The standard is not whether the verdict would have been different, but whether the evidence probably would have been a 'real factor' in the jury's deliberations." *Commonwealth v. Sullivan,* 469 Mass. 340, 350-351 (2014). The defendant argues that the new evidence would have been a "real factor" in three ways.

Exclusion of the Videotape. The defendant first argues that the newly discovered evidence of a crash edit of the videotape would have affected jury deliberations because, had the fact of the crash edit been known to the trial judge, the court likely would have excluded the copy from evidence.

To be admitted in evidence, the videotape had to be authenticated. Mass. G. Evid., § 901 (a) (2017 ed.) "Photographs usually are authenticated directly through competent testimony that the scene they show is a fair and accurate representation of something the witness actually saw. ... Moreover, the authenticity of a photograph is a preliminary question of fact for resolution by the trial judge. ... Once authenticated sufficiently for admission, remaining questions about a photograph's evidentiary value are for the trier of fact. ... All of those principles inhere in the overarching principle that '[t]he admissibility of photographic evidence is left to the discretion of the trial judge....'" *Commonwealth v. Figueroa,* 56 Mass. App. Ct. 641, 646 (2002). The same rules apply to the authentication of videotapes.

Commonwealth v. Heang, 458 Mass. 855-856 (2011). *Commonwealth v. Leneski*, 66 Mass. App. Ct. 291, 294 (2006) (videotapes are admissible if "they provide a fair representation of that which they purport to depict").

Det. Smith testified – and it was obvious from the videotape itself – that the tape was not a fair and accurate portrayal of the entire interview of Starks. Despite this, the trial judge had discretion to admit the tape. *Henderson v. D'Annolfo*, 15 Mass. App. Ct. 415, 428 (1983) (court had discretion to admit photographs although conditions depicted were not identical to conditions at relevant time). The question for the trial judge was whether the videotape was "relevant and helpful to the jury in its deliberations." *Id.*

At trial, both during a voir dire and in front of the jury, Det. Smith incorrectly identified the videotape that was admitted in evidence as Trial Exhibit 21 as the original recording of the Starks' interview. Trial Tr., 9/25/86, p. 15 & Trial Tr., 9/29/86, pp. 32-33. During the voir dire, Det. Smith testified that after recording the interview, he replayed the entire videotape;[9] the Sgt. Bilko segment was not on the tape at that point; the tape fairly and accurately depicted the interview; and he later inadvertently recorded the Sgt. Bilko segment when he pressed the record button instead of the play button on the VCR. Trial Tr., 9/25/86, pp. 15-17. Based on Det. Smith's testimony, the court found that "except for a brief interruption as a result of Detective Smith inadvertently pressing the wrong button for approximately 15 or 20 seconds, that the videotape is a fair and accurate representation of what occurred on that day." Trial Tr., 9/25/86, pp. 33-34. The court later admitted the tape in evidence. Trial Tr., 9/29/86, pp. 34-35.

The Starks interview was a critical piece of evidence. The central issue at trial was the identification of the defendant as the shooter. None of the eyewitnesses who testified at trial

[9] At the motion hearing, Det. Smith testified that he replayed only two or three minutes of the tape. Motion Hearing, 7/13/17, p. 63.

made an in-court identification of the defendant. Terri Lynn Starks was the only eyewitness who unequivocally testified that she picked out a photograph of the shooter prior to trial.

If the trial judge had been aware that the videotape identified by Det. Smith as the original recording was not the original recording but a copy that the police had edited to remove Starks' description of her view of the shooter, he almost certainly would have excluded the copy. This is especially so considering that the crash edit did not alter the original videotape. The original tape remained intact and, so far as the evidence shows, it remained in the possession of the police.

If the trial judge had excluded the edited copy of the tape, the jury either would not have seen the recording or would have seen the original, which included Starks' full description of what she saw at the time of the shooting. Either way, the newly discovered evidence would have been a "real factor" in the jury's deliberations.

Impeachment of Police Credibility. The defendant also contends that if the crash edit had been known at trial, it would have affected jury deliberations because it could have been used to impeach Det. Smith's credibility and the integrity of the police investigation.

"Newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial." *Commonwealth v. Lo,* 428 Mass. 45, 53 (1998), quoting *Commonwealth v. Ramirez,* 416 Mass. 41, 47 (1993). That general rule does not apply, however, when the newly discovered evidence shows that the police testified falsely at trial.

"[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment...." *Napue v. Illinois,* 360 U.S. 264, 269 (1964). *Commonwealth v. Sullivan,* 410 Mass. 521, 532 (1991). "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected

the judgment of the jury . . .'" *Giglio v. United States,* 405 U.S. 150, 154 (1972), quoting *Napue, supra,* at 271. "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence...." *Napue, supra* at 269.

If the defendant had known of the crash edit, he could have impeached Det. Smith's credibility by showing that Det. Smith's testimony, which provided an innocent explanation of the missing portion of the Starks interview, was false. Since Det. Smith was part of a team of detectives investigating the case, and since some member of the Brockton Police Department deleted material from a key piece of evidence, the newly discovered evidence would have provided the jury with a powerful reason to be skeptical of the police investigation and the testimony of the police witnesses.[10]

Det. Smith was the lead investigator and a key witness at trial. He testified that both Edna Levine and Lisa Pina picked out the defendant's photograph as the shooter, while they both denied having made the identifications. His partner, Det. LaGarde, testified that Denise Perkins twice picked out the defendant's photograph as the shooter. Perkins testified that she did not identify the shooter in the first array and, in the second array, picked out someone who looked "almost exactly" like the shooter. The testimony of Detectives Smith and LaGarde was therefore central to the prosecution's case. If the jury had known of Det. Smith's false testimony and that the police edited the recording to remove important evidence, it is reasonably

[10] As noted above, there is no basis to conclude that the prosecutor was aware of the false testimony.

likely that such knowledge could have affected their judgment. Because Det. Smith's false testimony could have affected the jury's judgment, a new trial is required.

Missing Exculpatory Evidence. The defendant also contends that evidence of the crash edit would have affected the jury's deliberations because the part of the tape that was excised contradicted the Commonwealth's theory of the case. The court disagrees.

The defendant contends that the crash edit redacted Starks' statement that she saw the shooter and the victim "come from behind Pete and Mary's and around from behind the body shop on Montello Street." That statement is recorded in Det. LaGarde's police report concerning the Starks' interview. [11] *Defendant's Motion for Post-Conviction Relief,* Appendix, Vol. 1, p. 35. Since that statement does not appear in the audiovisual recording of the interview, the defendant argues that it must have been removed in the crash edit. The defendant contends that statement was inconsistent with the Commonwealth's argument that the defendant and the victim exited the front door of Pete & Mary's together. Trial Tr., 9/30/86, p. 22 (closing argument).

The defendant's argument ignores the fact that Starks testified at trial that she first saw the two men when they were on the corner of Montello Street and a "side street where the fence was." Trial Tr., 9/23/86, p. 44.[12] It was therefore clear to the jury that Starks did not see them exit the front door of Pete & Mary's. Further, Starks testified that she saw both the shooter and the victim inside Pete & Mary's. Trial Tr., 9/23/86, pp. 42-43. The statement that at the time of

[11] The defendant claims that the Commonwealth improperly withheld the LaGarde report from the defense. That claim is addressed *infra.*

[12] Starks could not remember the name of the side street. She agreed with the prosecutor's suggestion that it was Franklin Street. That appears to be a mistake. According to the defendant's brief, Pete & Mary's was on the corner of Montello and Franklin Streets. The other corner of the block on Montello Street was at the intersection of Montello and Ward Street (now known as Petronelli Way.) There is an auto body shop with a chain link fence on that corner. *Defendant's Brief,* p. 47 (Paper # 75).

the shooting she saw them "come from behind Pete and Mary's and around from behind the body shop on Montello Street" only raises a question as to whether they exited Pete & Mary's through the front door or the back door prior to crossing Montello Street. It does not undercut Starks' identification of the defendant as the shooter. In short, the statement the defendant claims was edited out of the videotape was consistent with Starks' trial testimony and her identification of the defendant.

3. Withholding of Exculpatory Evidence

The defendant contends that the prosecution withheld the police report prepared by Detective Donald LaGarde that documented an exculpatory statement, described above, that police deleted from the audio-visual recording of the Starks interview.

"The Commonwealth has a duty to disclose favorable evidence that it has in its possession, which could materially aid the defendant. ... The Commonwealth's failure to disclose such exculpatory evidence may warrant a new trial, ... and where specifically requested favorable evidence is not disclosed the defendant 'need only demonstrate that a substantial basis exists for claiming prejudice.'" *Commonwealth v. Camacho,* 472 Mass. 587, 598 (2015). *Commonwealth v. Tucceri,* 412 Mass. 401, 404–405 (1992). *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

The evidence does not establish that the prosecution withheld the LaGarde report from the defendant. The defendant states in his brief that his trial counsel is deceased and he has not determined what documents were in his trial counsel's file. *Defendant's Brief,* p. 54 n. 44 (Paper # 75).

The defendant urges the court to infer that the Commonwealth breached its duty to turn over the LaGarde report based on events at trial. During cross-examination of Det. LaGarde,

defense counsel asked for and received the notes Det. LaGarde made of his interview with the defendant. Defense counsel then pointed out that Det. LaGarde's notes omitted any reference to the defendant's statement that he did not leave Pete & Mary's to go to D'Angelo's. The prosecutor attempted to rehabilitate Det. LaGarde. The defendant argues that the fact that defense counsel used the detective's notes, rather than his formal report, indicates that defense counsel did not have the report. The defendant argues that the same conclusion is supported by the fact that the prosecutor used Det. LaGarde's grand jury testimony rather than his police report to attempt to rehabilitate his testimony. The fact that the attorneys relied on certain documents rather than others to make their points is not a reasonable basis to infer that the prosecutor withheld Det. LaGarde's report from defense counsel.

In addition, as noted *supra,* Det. LaGarde's report, which documented a statement by Starks that the shooter and the victim came around an auto body shop prior to crossing Montello Street, was consistent with Terri Lynn Starks' in-court testimony as to where she first saw the two men and as to her identification of the defendant as the shooter.

In short, there was no reason to withhold Det. LaGarde's report from the defense and there is no reasonable basis to infer that the Commonwealth failed to provide it to defense counsel. The defendant has not demonstrated that the Commonwealth withheld the report.

4. <u>Defense Counsel's Conflicts of Interest</u>

The defendant also seeks a new trial on the ground that his trial attorney had a conflict of interest because he had previously represented police officers who testified at trial and was still representing Det. LaGarde at the time of the trial.

This information was disclosed to the defendant – belatedly – at trial. The trial judge explained the risk of the conflict to the defendant and gave him the option of being represented

by a different attorney or at least taking some time to think about it. The defendant replied, "No, I don't need no time; yes, I will keep my same lawyer. I'm not changing; I'm not even considering that." Trial Tr., 9/24/86, pp. 89. The trial judge found that the defendant had voluntarily and knowingly decided to be represented by his attorney and ruled that the attorney could continue to represent the defendant. Trial Tr., 9/24/86, pp. 90.

Because this issue arose at trial, the Supreme Judicial Court considered it in the course of its review of the entire record under G.L. c. 278, § 33E. Thereafter, the defendant raised this argument in his second motion for new trial. The court (Tierney, J.) denied the motion and a single justice of the Supreme Judicial Court denied the defendant's request to appeal. *Id.* The single justice specifically addressed and rejected this argument in his written decision. *Defendant's Motion for Post-Conviction Relief,* Appendix, Vol. 1, p. 266.

This issue of the validity of the defendant's waiver of his right to conflict-free counsel has now been reviewed four times: twice by the trial court, once by the full Supreme Judicial Court and once by a single justice of the Supreme Judicial Court. The court declines to consider the issue for a fifth time, absent any change in circumstances.

5. <u>Ineffective Assistance of Trial Counsel</u>

The defendant further contends that his conviction should be overturned because his trial attorney provided ineffective assistance of counsel in preparation and representation at trial.

"Both art. 12 of the Declaration of Rights of the Massachusetts Constitution and the Sixth Amendment to the United States Constitution guarantee a right to the effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668 (1984). *Commonwealth v. Hurley,* 391 Mass. 76 (1984). This right has been recognized as essential to the protection of the fundamental right to a trial. *Id.* [The Supreme Judicial Court has] held that the right to effective

assistance of counsel, afforded a defendant by art. 12, 'provide[s] greater safeguards than the Bill of Rights of the United States Constitution.' *Commonwealth v. Hodge,* 386 Mass. 165, 169 (1982). Thus, if the Massachusetts standard for effective assistance of counsel is met, 'the Federal test is necessarily met as well.' *Commonwealth v. Fuller,* 394 Mass. 251, 256 n. 3 (1985)." *Commonwealth v. Lykus,* 406 Mass. 135, 138-139 (1989).

"A defendant has a heavy burden to establish ineffective assistance of counsel sufficient to warrant a new trial. The defendant must show that counsel's performance fell 'measurably below that which might be expected from an ordinary fallible lawyer,' and that this performance 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" *Commonwealth v. Lao,* 450 Mass. 215, 221 (2007), quoting *Commonwealth v. Saferian,* 366 Mass. 89, 96 (1974). "A strategic or tactical decision by counsel will not be considered ineffective assistance unless the decision was 'manifestly unreasonable' when made. ... Further, mere speculation, without more, is insufficient to establish ineffective representation." *Commonwealth v. Watson,* 455 Mass. 246, 256 (2009) (citations omitted). *Saferian, supra.*

The defendant claimed in both his first and second motions for new trial that his trial attorney (and also his appellate attorney) provided constitutionally inadequate representation. Those claims were rejected by the trial court. Petitions for leave to appeal those decisions were denied by single justices of the Supreme Judicial Court under the gatekeeper provision of G.L. c. 278, § 33E. In his third motion, he asserts eight errors by his trial attorney. None of them rises to the level required to obtain a new trial. The court will briefly review the eight alleged deficiencies:

1. ***Miko Brown.*** The defendant asserts that his attorney should have investigated and called Miko Brown as a witness at trial. She told a police officer that she was with the victim in Pete & Mary's and that they left the bar with no one else.

She then walked away and the victim walked alone to his car in the D'Angelo's lot. She did not see anything else.

In light of the number of witnesses who saw the shooter cross the street with the victim and then shoot the victim in the parking lot, defendant's attorney may have reasonably concluded that Brown's recollection was not helpful. In addition, Brown told the police that a large group of heavily armed Marielitos had come to Brockton looking for the defendant. Defense counsel could reasonably have decided that he did not want to take a chance on having that information related to the jury.

2. ***Third Party Culprit Evidence.*** The defendant asserts that his trial attorney should have introduced evidence that the police originally had a second suspect, Stevie Betts, and that in the course of their investigation officers found Donald "Deke" Houston hiding in Denise Bradshaw's closet.

   Defense counsel may have reasonably concluded that these facts were of limited usefulness and that contrasting the weak basis for suspicion that those two individuals were the shooter with the stronger evidence against the defendant would not be helpful.

3. ***Height of the Shooter Compared to the Defendant.*** The defendant asserts that his attorney should have focused the jury more on the differences between descriptions of the shooter and the defendant's height and clothing.

   Defense counsel could reasonably have concluded that given the many discrepancies in the descriptions of the shooter provided by the witnesses, it was better to focus the jury on the other weaknesses in the identification evidence.

4. ***Terri Lynn Starks.*** The defendant asserts that his attorney should have cross-examined Terri Lynn Starks for a longer period of time and brought out the fact that Starks had pending criminal charges against her, in order to show that she had a reason to curry favor with the police. He also asserts that his attorney should have questioned Starks about her statement, recorded in Det. LaGarde's report, that she first saw the shooter and the victim on the corner and that they had come around the body shop.

   Defense counsel could reasonably have concluded that there was little need to bring out the pending charges against Starks since the fact that she was in custody was mentioned both by the police and by the trial judge. For the reasons explained above, the statement by Starks as to where she first saw the two men did not make it any less likely that the defendant was the shooter.

5. ***Sgt. Fotis Colocousis.*** The defendant asserts that his attorney should have elicited evidence from Sgt. Colocousis that the defendant was standing in the crowd outside Pete & Mary's after the shooting and that Paul Jones and Denise

Perkins observed the crowd but failed to identify the defendant as being the shooter. He also argues that counsel should not have told the jury in his opening statement that he would present evidence that Jones and Perkins actually spoke to the defendant at that time.

Defense counsel elicited testimony from Officer Richard Shanks regarding the failure of Jones and Perkins to identify the defendant in the crowd. Defense counsel may have been mistaken about whether Jones and Perkins actually spoke to the defendant. If so, the mistake is unlikely to have influenced the verdict.

6. ***Closing Argument: Descriptions of the Shooter.*** The defendant asserts that his attorney should have used his closing argument to highlight the differences between descriptions of the shooter given by witnesses and the defendant's height and clothing.

   As stated above, defense counsel could reasonably have concluded that given the many discrepancies in the descriptions of the shooter provided by the witnesses, it was better to focus the jury on the other weaknesses in the identification evidence.

7. ***Failure to Have Defendant Sit at Counsel Table.*** The defendant asserts that his attorney should have had him sit at counsel table.

   The defendant already raised this issue, without success, in his second motion for new trial. While it may have facilitated communication between the defendant and his attorney if they were sitting together, it is unlikely that the seating arrangements had a significant impact on the verdict.

8. ***Inaccurate Description of Path of Flight.*** The defendant asserts that his attorney erred in describing the path of the shooter's flight when describing it for the jury prior to the view. In describing the direction in which the shooter fled, defense counsel used the name of the side street closer to Pete & Mary's (Franklin Street) rather than the name of the side street farther away (Ward Street.) The evidence was that the shooter ran up Ward Street and jumped a fence to get to Franklin Street in the area of the Colonial Spa.

   It is highly unlikely that this minor error in describing the direction in which the shooter fled had any significant impact on the jury.

The defendant's complaints about the adequacy of his representation consist of critiques of counsel's performance made in hindsight with knowledge that counsel was unsuccessful. "The test [for constitutional effectiveness] is not to be made with the advantage of hindsight, and any violation of the attorney's duty must be both substantial and prejudicial."

Commonwealth v. Adams, 374 Mass. 722, 729 (1978). The "guaranty of the right to counsel is not an assurance to defendants of brilliant representation or one free of mistakes." *Commonwealth v. LeBlanc,* 364 Mass. 1, 13–14 (1973). Defense counsel's performance in this case met the constitutional minimum of an "ordinary, fallible lawyer." *Saferian, supra* at 96.

6. Suggestive Identification Procedures

Finally, the defendant argues that he is entitled to a new trial because the police engaged in suggestive identification practices in interviewing witnesses.

In *Commonwealth v. Johnson,* 420 Mass. 458, 465 (1995), the Supreme Judicial Court recognized that "mistaken identification is believed widely to be the primary cause of erroneous convictions." In recent years, the Court has made many improvements in the law governing eyewitness identification, designed to promote accuracy. See, e.g., *Commonwealth v. Silva-Santiago,* 453 Mass. 782, 793-797 (2009) (photo arrays); *Commonwealth v. Crayton,* 470 Mass. 228, 241-243 (2014) (in-court identifications); *Supreme Judicial Court, Model Jury Instructions on Eyewitness Identifications,* 473 Mass. 1051 (2015). See generally, *Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices* (2013), available at http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf (last visited Dec. 10, 2017).

The defendant correctly points out that the identification procedures employed by police in the 1985 investigation did not comply with current legal requirements. Although the defendant acknowledges that the new rules of law governing identification procedures "are required on a prospective basis," *Defendant's Brief,* p. 93 (Paper # 75), he urges the court to apply them in this case. He argues that "this court is not foreclosed from considering the

advancements in understanding in eyewitness perceptions and procedures that have occurred over the last three decades." *Id.*

A defendant is required to raise "[a]ll grounds for relief" in his or her first motion for postconviction relief. 'Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.' Mass. R. Civ. P. 30(c)(2). 'The rule of waiver established in [Rule 30(c)(2)] applies, as a result of case law, to claims that were not preserved at trial or not raised in an appeal, as well as to claims that were not put forward in a prior new trial motion.' *Id.* (reporter's notes). 'If a defendant fails to raise a claim that is generally known and available at the time of trial or direct appeal or in the first motion for postconviction relief, the claim is waived. This requirement is critical to achieve finality in the litigation of criminal cases and to assure that limited judicial resources are not consumed by claims that should have been raised earlier.'" *Rodwell v. Commonwealth,* 432 Mass. 1016, 1018 (2000). Mass. R. Crim. P. 30(c)(2).

The flaws in identification procedures that the defendant now seeks to raise were either known or could have been known at the time of the defendant's direct appeal in 1990 or in his prior motions for new trial in 1992 and 2000. They are not newly discovered evidence. "Newly discovered evidence is evidence that was unknown to the defendant or counsel and not reasonably discoverable by them at the time of trial." *Commonwealth v. Sullivan,* 469 Mass. 340, 350 n. 6 (2014).

"[A] motion for new trial may not be used as a vehicle to compel ... review and [consideration of] questions of law, on which a defendant has had his day in an appellate court, or [on which he has] forgone that opportunity. ... While a judge does have the discretion to

rehear such questions, [the Supreme Judicial Court] has recommended restricting the exercise of that power to those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result." *Commonwealth v. Watson*, 409 Mass. 110, 112 (1991) (citations and quotations omitted).

Since the defendant did not raise any challenge to the identification procedures employed in this case at trial, in his direct appeal or in his first two motions for new trial, his claim on this issue is waived. The defendant has not established that the use by police of identification procedures that were permitted in 1985 but are prohibited today has resulted in a miscarriage of justice. He merely argues that the identification procedures required today are more accurate than the identification procedures allowed in 1985. That is insufficient. To allow a new trial on this ground requires evidence that the identification procedures resulted in an erroneous verdict.

ORDER

The defendant's third motion for post-conviction relief (Paper # 75) is **ALLOWED** on two grounds: (1) the defendant did not receive a trial before an impartial jury because one juror was racially biased; and (2) a police detective testified falsely at trial that he accidentally deleted a segment of the videotape recording of the Terri Lynn Starks interview when he pressed the wrong button on the recording equipment, thereby providing an innocent, but false, explanation for the loss of important evidence.

December 18, 2017

Thomas F. McGuire, Jr.
Justice of the Superior Court

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